

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JESSE GONZALES,

Petitioner,

v.

MARGARET GILBERT,

Respondent.

Case No. C15-2036 MJP-BAT

**REPORT AND
RECOMMENDATION**

Petitioner Jesse Gonzales is a Washington state prisoner proceeding pro se with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. Mr. Gonzales filed his petition challenging his 2012 conviction, upon plea, of first-degree rape and first degree burglary, on December 30, 2015. Dkt. 1. The Court directed service of the petition and appointed counsel to represent petitioner. Dkt. 9. On March 29, 2016, Respondent Margaret Gilbert filed her answer to the petition and relevant portions of the state court record. Dkt. 18 and 19. On April 13, 2016, petitioner, after consulting with his counsel, signed a consent to dismissal and moved to voluntarily dismiss his petition. Dkt. 22. Respondent filed no papers in opposition to the motion to dismiss. The undersigned recommends that the motion to voluntarily dismiss the petition be granted.

DISCUSSION

A petitioner may voluntarily dismiss an action without leave of court before service by the adverse party of an answer or motion for summary judgment. Fed. R. Civ. P. 41(a).

1 Otherwise, an action shall not be dismissed except upon order of the court and upon such terms
2 and conditions as the court deems proper. *Id.* Here, respondent filed an answer to the habeas
3 petition and filed relevant portions of the state court record before petitioner filed his motion to
4 voluntarily dismiss his habeas petition. *See* Dkt. 18, 19, and 22. However, respondent filed no
5 papers in opposition to the motion to dismiss and the Court finds that dismissal as requested by
6 petitioner is proper.

7 If the district court adopts the Report and Recommendation, it must determine whether a
8 certificate of appealability (“COA”) should issue. Rule 11(a), Rules Governing Section 2254
9 Cases in the United States District Courts (“The district court must issue or deny a certificate of
10 appealability when it enters a final order adverse to the applicant.”). When the district court
11 denies a habeas petition on procedural grounds without reaching the petitioner’s underlying
12 constitutional claim, a COA should issue if the petitioner shows, at least, that jurists of reason
13 would find it debatable whether the petition states a valid claim of the denial of a constitutional
14 right, and that jurists of reason would find it debatable whether the district court was correct in
15 its procedural ruling. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

16 The Court recommends that Mr. Gonzales not be issued a COA. In light of his signed
17 consent and motion to voluntarily dismiss his claim, this Court did not determine whether Mr.
18 Gonzales had stated a valid claim of the denial of a constitutional right. However, no jurist of
19 reason would find it debatable whether this Court’s dismissal of the petition based on the
20 petitioner’s signed consent and motion for dismissal is debatable or incorrect. Mr. Gonzales
21 should address whether a COA should issue in his written objections, if any, to this Report and
22 Recommendation.

1 **CONCLUSION**

2 The Court recommends **DISMISSING** the habeas petition and **DENYING** the issuance
3 of a certificate of appealability.

4 Any objections to this Recommendation must be filed and served upon all parties no later
5 than **Tuesday, May 17, 2016**. The Clerk should note the matter for **Thursday, May 19, 2016**,
6 as ready for the District Judge's consideration if no objection is filed. If objections are filed, any
7 response is due within 14 days after being served with the objections. A party filing an objection
8 must note the matter for the Court's consideration 14 days from the date the objection is filed
9 and served. The matter will then be ready for the Court's consideration on the date the response
10 is due. Objections and responses shall not exceed twelve (12) pages. The failure to timely
11 object may affect the right to appeal.

12 DATED this 27th day of April, 2016.

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15 BRIAN A. TSUCHIDA
16 United States Magistrate Judge
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